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No. 91-700

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In the Supreme Court of the United States

OCTOBER TERM, 1991

TEODORA OLIVAREZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

VICKI S. MARANI
Attorney
Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTIONS PRESENTED

1. Whether a conviction under the Bank Secrecy Act, 31 U.S.C. 5324, must be set aside when the jury returns a general verdict and the evidence is insufficient to support one of the means of committing the offense that was alleged in the indictment.

2. Whether the Sixth Amendment or the Due Process Clause required that the jury agree on the manner in which petitioner violated the Bank Secrecy Act.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A3-A12) is unreported, but the judgment is noted at 940 F.2d 656 (Table).

JURISDICTION

The judgment of the court of appeals was entered on July 25, 1991. A petition for rehearing was denied on August 21, 1991. Pet. App. A13. The petition for a writ of certiorari was filed on October 24, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Southern District of Texas, petitioner was convicted of violating the Bank Secrecy Act by attempting to cause a bank to fail to file a currency transaction report, in violation of 31 U.S.C. 5324(1), and structuring a financial transaction to evade the requirement that the bank involved in the transaction file a currency transaction report, in violation of 31 U.S.C. 5324(3). She was sentenced to a prison term of a year and a day, to be followed by two years' supervised release. She was also ordered to pay a fine of $3000. The court of appeals affirmed. Pet. App. A3-A12; C.A. Record Excerpts Doc. 3.

1. On April 13, 1988, petitioner, accompanied by her mother, entered the First National Bank in Rio Grande City, Texas. Petitioner told Elmo Moreno, an officer of the bank, that she wanted to exchange some currency for currency of larger denominations without having the exchange reported in a currency transaction report (CTR). Petitioner knew at the time that CTRs were required for cash transactions in excess of $10,000. When Moreno mentioned the reporting requirement, petitioner offered to pay Moreno a "commission" if he agreed not to file a CTR. Moreno refused. Pet. App. A4; Tr. 19-25, 28, 33-34, 37, 57-61.

Petitioner and her mother then went to the teller station manned by Criseda Sepulveda. Petitioner told Sepulveda that she wanted to exchange $9000 in $5 bills for the same amount in $100 bills. After Sepulveda made the exchange, petitioner said that her mother also had $9000 to exchange. Petitioner's mother left the bank and returned with another $9000 in $5 bills. Sepulveda asked petitioner for identification, explaining that, because the total transaction

involved more than $10,000 in cash, a CTR would have to be filed. Petitioner claimed that she did not have any identification with her and that Moreno had approved her exchanging the cash without the filing of a CTR. Sepulveda then made the second exchange. After petitioner left the bank with the $18,000, Sepulveda filed a CTR using the name and address that petitioner had provided. Pet. App. A4-A5; Tr. 38-47, 51, 51-52, 55, 58, 90-91.

Petitioner was subsequently charged in a one-count indictment [1] with violating 31 U.S.C. 5324(1) and (3).[2]

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[1] The indictment read (C.A. Record Excerpts Doc. 2):

> On or about April 13, 1988, in the Southern District of Texas and within the jurisdiction of the Court, Defendant TEODORA OLIVAREZ did knowingly and willfully, for the purpose of evading the reporting requirements of Title 31, United States Code, Section 5313(a), cause and attempt to cause a domestic financial institution, to wit: First National Bank of Rio Grande City of Texas, to fail to file a report required under Section 5313(a) and did cause and attempt to cause, structure, attempt to structure, and assist in structuring a transaction with First National Bank of Rio Grande City of Texas by exchanging eighteen thousand ($18,000.00) dollars in five ($5.00) dollar United States currency bills for one hundred ($100.00) dollar bills by structuring the transaction by dividing the exchange into two exchanges of nine thousand ($9,000.00) dollars each.

[2] 31 U.S.C. 5324 provides:

> No person shall for the purpose of evading the reporting requirements of section 5313(a) with respect to such transaction—
>
> > (1) cause or attempt to cause a domestic financial institution to fail to file a report required under section 5313(a); [or]
>
> * * * * *

[Continued]

2. At trial, petitioner testified in her own defense. She admitted that when she went to the bank she knew that CTRs were required for cash transactions in excess of $10,000. Tr. 71. She also admitted telling Sepulveda that Moreno had approved petitioner's exchanging the $18,000 without the filing of a CTR. Petitioner claimed at trial that Moreno had told petitioner that no CTR was required if $9000 of the currency she sought to exchange belonged to her and the other $9000 belonged to her mother. Petitioner admitted that, although she and her mother had each carried half the money into the bank, petitioner was carrying the entire $18,000 in cash when she left the bank. Tr. 70-74, 75-79, 85-87.

At the charging conference, the prosecutor asked the court to instruct the jury on both subsections (1) and (3) of 31 U.S.C. 5324. Pet. App. A43. The court said it would instruct the jury that it could convict petitioner if it found her guilty under either subsection. *Id.* at A50-A51. Defense counsel objected that the government had to prove petitioner's guilt under both subsections "[s]ince they pled it in the conjunctive." *Id.* at A52-A53. The court overruled that objection. *Id.* at A55.

The court read the indictment and subsections (1) and (3) of 31 U.S.C. 5324 to the jury. Pet. App. A15-A16, A18-A20. The court instructed the jury that, to find petitioner guilty of the charges, it had to conclude beyond a reasonable doubt that, for the purpose of evading the reporting requirements of 31 U.S.C. 5313(a), petitioner had caused or attempted to

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[2] [Continued]

> (3) structure or assist in structuring, or attempt to structure or assist in structuring, any transaction with one or more domestic financial institutions.

cause a bank to fail to file a CTR under subsection (1), or that she had structured or attempted to structure a financial transaction with a bank under subsection (3). Pet. App. A22-A23. The court also instructed the jury that its verdict had to be unanimous. *Id.* at A29. The jury returned a general verdict of guilty. *Id.* at A10.

3. On appeal, petitioner conceded that the evidence was sufficient to show that she had violated subsection (3) of the statute. Pet. App. A6. Petitioner argued, however, that her conviction was invalid because the evidence was insufficient to support the allegation in the indictment that she had violated subsection (1) by both "caus[ing] and attempt[ing] to cause" the bank to fail to file a CTR. Petitioner asserted that, even though it was undisputed that the bank had filed a CTR, the jury was authorized under the instructions to find her guilty of causing the bank to fail to file a CTR. Petitioner contended that, because the jury might have convicted her on that theory despite the absence of evidence to support it, she had been denied due process.

The court of appeals affirmed. Pet. App. A3-A12. It held that there was no genuine possibility that the jury found that petitioner had caused the bank to fail to file a CTR, nor was there any reason to believe that the jury's verdict was less than unanimous. *Id.* at A9-A10.[3]

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[3] Petitioner also advanced several challenges to her sentence. Pet. C.A. Br. 13-20. The court of appeals rejected those challenges, Pet. App. A10-A12, and petitioner does not renew them in this Court.

ARGUMENT

The jury was instructed that it could find petitioner guilty of violating the Bank Secrecy Act if it found that she did any of the following: (1) caused the bank to fail to file a CTR; (2) attempted to cause the bank to do so; (3) structured a transaction to evade the requirement of filing a CTR; or (4) attempted to do so. Petitioner contends that, by submitting the case to the jury on each of those alternative theories, the district court violated her constitutional rights in two ways. She argues, first, that her due process rights were violated by the possibility that the verdict was based on the first theory, for which, she claims, the evidence was insufficient. That argument is foreclosed by this Court's decision in *Griffin* v. *United States*, No. 90-6352 (Dec. 3, 1991). She also argues that her due process and Sixth Amendment rights were violated by the possibility that the jury did not agree on the manner in which she violated the Bank Secrecy Act. Petitioner's second argument is foreclosed by this Court's decision in *Schad* v. *Arizona*, 111 S. Ct. 2491 (1991).

1. In *Griffin*, this Court held that the Due Process Clause does not require a guilty verdict on a multiple-object conspiracy to be set aside if the evidence is inadequate to support the verdict as to one of the objects. *Griffin*, slip op. 3-14. In so holding, the Court relied on the common-law rule "that a general jury verdict [is] valid so long as it [is] legally supportable on one of the submitted grounds." *Id.* at 3. That rule, the Court observed, had consistently been applied to uphold "a general jury verdict under a single count charging the commission of an offense by two or more means" when the evidence was insufficient to support one of the means by which the

offense was alleged to have been committed. *Id.* at 4 (emphasis omitted). As an example of the rule's application in that context, the Court in *Griffin*, slip op. 10, cited *Turner* v. *United States*, 396 U.S. 398 (1970), in which the Court stated that "when a jury returns a guilty verdict on an indictment charging several acts in the conjunctive, * * * the verdict stands if the evidence is sufficient with respect to any one of the acts charged." 396 U.S. at 420.

The common-law rule applied in *Griffin* and *Turner* disposes of petitioner's due process challenge. Petitioner contends that her conviction must be set aside because the jury might have based its verdict on a finding that she caused the bank to fail to file a CTR, notwithstanding the undisputed evidence that the bank *did* file a CTR. *Griffin* and *Turner* make clear, however, that due process does not require a guilty verdict to be set aside if one of the possible bases of conviction was "unsupported by sufficient evidence," *Griffin*, slip op. 10, as long as the evidence was sufficient with respect to one of the other possible bases of conviction, *Turner*, 396 U.S. at 420. Here, the evidence was sufficient to show that petitioner violated the Bank Secrecy Act in three of the four ways alleged in the indictment. The evidence showed that petitioner attempted to cause the bank to fail to file a CTR by offering to pay a bank officer a "commission" if he agreed not to file a CTR, and by falsely telling the teller that the bank officer had authorized her $18,000 transaction to be conducted without the filing of a CTR. As petitioner conceded below, the evidence was also sufficient to show that she had both structured and attempted to structure her transaction to evade the CTR filing requirement. Pet. App. A6.[4]

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[4] In her brief to the court of appeals, petitioner stated: "Viewed in a light most favorable to the jury's verdict, the

The court of appeals correctly held that petitioner was not entitled to have her conviction set aside simply because the government had not proved that she committed the offense charged by each and every means alleged in the indictment. Pet. App. A8-A9.

Petitioner relies (Pet. 33-39) on decisions in which the Court has set aside general verdicts when one of the possible bases of conviction was legally inadequate. See, *e.g.*, *Yates* v. *United States*, 354 U.S. 298 (1957); *Cramer* v. *United States*, 325 U.S. 1 (1945); *Stromberg* v. *California*, 283 U.S. 359, 367-370 (1931). In *Griffin*, however, the Court made clear that the *Yates* line of cases does not apply when one of the possible bases of conviction is challenged as factually unsupported. *Griffin*, slip op. 5-13. The Court explained that its decisions draw a "clear line" between verdicts challenged for "legal error" and those challenged for "insufficiency of proof." *Id.* at 12, 13. Petitioner's challenge falls into the second category; under *Griffin* and *Turner*, it therefore fails to make out a due process violation.[5]

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evidence was sufficient to sustain the jury's verdict as to a Subsec. (3) theory [i.e., carving up a single transaction into two less than $10,000.00 transactions]." Pet. C.A. Br. 7 (bracketed text in original). Petitioner now attempts to qualify that concession by pointing to a subsequent passage in her court of appeals brief regarding petitioner's "defensive testimony" to the effect that she did not intend to break the law. Pet. 12 (quoting Pet. C.A. Br. 8). Petitioner does not deny, however, that a rational jury could have disbelieved that testimony; indeed, her concession in the court of appeals implicitly recognized that the jury could rationally have concluded that she acted with the requisite *mens rea*.

[5] Petitioner's reliance on *Mills* v. *Maryland*, 486 U.S. 367 (1988), see Pet. 30-31, and *United States* v. *Meriwether*, 440 F.2d 753, 756-757 (5th Cir. 1971), see Pet. 20-21, is likewise

2. Petitioner next contends that her conviction must be reversed because it "cannot be said to be based on a jury verdict which is clearly unanimous" as to the way in which she violated the statute. Pet. 16-17 (emphasis omitted). Under *Schad* v. *Arizona*, 111 S. Ct. 2491 (1991), however, the jury was required to agree only that petitioner committed the offense charged; the jury was not required to agree on the means by which she committed that offense.

In *Schad*, this Court upheld against due process and Sixth Amendment challenges a state first-degree murder conviction. The trial court's instructions in that case did not require the jury to agree on whether the defendant committed premeditated murder or felony murder, the two theories on which the defendant was prosecuted. This Court framed the issue as whether the legislature could, consistently with due process, define first-degree murder as a single crime that included felony murder and premeditated murder. *Schad*, 111 S. Ct. at 2496 (plurality); *id.* at 2506 (Scalia, J., concurring in part and concurring in the

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misplaced. In *Mills*, the Court relied in part on *Yates* and *Stromberg* in vacating a death sentence based on a jury instruction that could have been construed to require jury unanimity in finding mitigating circumstances. *Mills* thus involved a sentence that may have reflected legal error; the decision has no bearing on the evidentiary challenge to the verdict in the present case. In *Meriwether*, the Fifth Circuit reversed a conviction for attempted income tax evasion because the district court committed legal error in instructing the jury as to one of the two methods of proof relied on by the government to establish the defendant's taxable income. By contrast, the jury in this case was properly instructed. The only asserted flaw in the case was a lack of evidence as to one of the means by which the crime was alleged to have been committed. *Meriwether* is thus inapposite here.

judgment).[6] Although the plurality and the concurring Justice in *Schad* approached that issue in different ways, both made clear that a legislature has broad discretion, when defining an offense, to provide that the offense may be committed by various means. *Id.* at 2500-2501 (plurality); *id.* at 2506 (Scalia, J., concurring). Both also agreed that due process analysis must comport with the "general rule that when a single crime can be committed in various ways, jurors need not agree upon the mode of commission." *Id.* at 2506 (Scalia, J., concurring); see also *id.* at 2497 (plurality). Thus, for example, when a defendant has been charged with murdering his victim by both shooting and drowning her, the jury need not agree on which of the two acts charged caused the death. *Id.* at 2497 (plurality); see also *id.* at 2506 (Scalia, J., concurring). Instead, the limits of due process are implicated only by, for example, an offense "so generic[ally]" defined "that any combination of jury findings of embezzlement, reckless driving, murder, burglary, tax evasion, or littering * * * would suffice for conviction." *Id.* at 2498 (plurality); see also *id.* at 2506 (Scalia, J., concurring) ("one can conceive of novel 'umbrella' crimes (a felony consisting of either robbery or failure to file a tax return) where permitting a 6-6 verdict would seem contrary to due process").

The statute under which petitioner was convicted does not bear any resemblance to the hypothetical

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[6] Although the defendant in *Schad* based his challenge on both due process and the Sixth Amendment, the Court held that the issue of whether a jury must agree on the manner in which an offense was committed is "properly characterized" as an issue of due process. 111 S. Ct. at 2498 n.5; see also *id.* at 2506 (Scalia, J., concurring).

statutes that the Court in *Schad* suggested would be impermissible. Petitioner was convicted under 31 U.S.C. 5324, which makes it a crime to cause, or attempt to cause, a bank to fail to file a CTR, or to structure, or attempt to structure, a transaction to evade the CTR filing requirement. Petitioner does not dispute that 31 U.S.C. 5324 defines only one offense, which may be committed in more than one way. With respect to the relationship among the various ways in which that offense can be committed, 31 U.S.C. 5324 is much closer to the examples cited in *Schad* as clearly permissible than it is to the examples of impermissible statutes discussed in *Schad*. Under *Schad*, therefore, petitioner's verdict-specificity argument must fail.

Petitioner's attempt to distinguish *Schad* is unpersuasive. Petitioner asserts that the reasoning of *Schad* is limited to convictions under statutes that define alternative means of satisfying the *mens rea* element of an offense. Pet. 30-31. *Schad* cannot be so limited. The Court in *Schad* premised its decision that "the jury need not agree as to * * * alternative means of satisfying the element of *mens rea*" on "the rule that the jury need not agree as to mere means of satisfying the *actus reus* element of an offense"; the Court could "see no reason * * * why" the same rule "should not apply equally" to both elements. 111 S. Ct. at 2497; see also *id.* at 2506 (Scalia, J., concurring). Thus, the fact that the present case involves a statute prescribing alternative *actus rei* places it squarely within the longstanding rule on which *Schad* was based.[7]

[7] All but one of the lower court decisions on which petitioner relies (Pet. 19-28) were decided before *Schad* and are no longer good law to the extent they are inconsistent with

Schad. Moreover, the continuing validity of those prior decisions is highly dubious because they follow *United States* v. *Gipson*, 553 F.2d 453 (5th Cir. 1977), a decision that was expressly disapproved by the plurality in *Schad*. See 111 S. Ct. at 2498-2499 & n.5 (also disapproving *United States* v. *Duncan*, 850 F.2d 1104 (6th Cir.), aff'd on remand, 881 F.2d 1077 (5th Cir. 1989) (Table), cert. denied, 493 U.S. 1025 (1990), cited in Pet. 21, and *United States* v. *Beros*, 833 F.2d 455 (3d Cir. 1987), cited in Pet. 25-28). Petitioner's reliance (Pet. 18-19) on the reference in *McKoy* v. *North Carolina*, 110 S. Ct. 1227, 1237 n.5 (1990) (Blackmun, J., concurring), to lower court decisions following *Gipson* is misplaced for the same reason. Finally, *United States* v. *Holley*, 942 F.2d 916 (5th Cir. 1991), the only post-*Schad* case cited by petitioner, Pet. 28-29, is distinguishable from the instant case. In *Holley*, the defendant was charged with two counts of perjury. Both counts alleged multiple false statements, and the government was required to prove dissimilar facts to show the knowing falsity of each statement. 942 F.2d at 928. Over the defendant's objection, the district court gave an instruction that the jury could reasonably have interpreted as allowing them to convict as long as each juror found at least one statement in each count was knowingly false. *Ibid*. Distinguishing *Schad*, the court in *Holley* reversed and remanded for a new trial, holding that each of the two counts in the indictment was duplicitous, *i.e.*, each count charged more than one offense, and that there was a reasonable possibility that the jury was not unanimous with respect to at least one statement in each count. *Id*. at 927-929. In the instant case, by contrast, the indictment charged a single offense, and petitioner accordingly has never challenged the indictment as duplicitous.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

VICKI S. MARANI
Attorney

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